No. 21162

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OSVALDO LUGO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, Southern Division, adjudging appellant to be guilty as charged in three counts of a four-count indictment following trial by jury (C.T. 2-7).[1]

The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

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[1] "C.T." refers to the Clerk's Transcript of Record.

II

STATEMENT OF THE CASE

Appellant and Jose De La Rosa-Wuancho were charged in all counts of a four-count indictment returned by the Federal Grand Jury for the Southern District of California.

Count one charged that appellant Lugo, De La Rosa-Wuancho, and other persons unknown to the Grand Jury agreed, confederated, and conspired to commit the offense of knowingly concealing and facilitating the transportation and concealment of heroin which had been imported and brought into the United States contrary to law, in violation of Title 21, United States Code, Section 173. One overt was specifically described (C.T. 2-3).

Count Two charged that De La Rosa-Wuancho (hereinafter referred to as "De La Rosa") imported and brought approximately two ounces of heroin into the United States, and that appellant knowingly aided, abetted, counseled, induced, and procured the commission of that offense (C.T. 4).

Count Three charged that De La Rosa knowingly concealed, and facilitated the transportation and concealment of, approximately two ounces of heroin, which, as he then and there well knew, had been imported and brought into the United States contrary to law, and that appellant knowingly aided, abetted, counseled, induced, and procured the commission of that offense (C.T. 5).

Count Four charged that appellant and De La Rosa knowingly

and unlawfully received, concealed, and facilitated the concealment and transportation of four grains of heroin which, as the defendants then and there well knew, previously had been imported into the United States contrary to Title 21, United States Code, Section 174 (C.T. 6).

Counts One and Four alleged offenses occurring in the Central Division of the Southern District of California, and the other counts alleged offenses occurring in Imperial County in the Southern Division (C.T. 2-6).

Jury trial of appellant commenced on February 1, 1966, before United States District Judge Fred Kunzel. Appellant was found guilty as charged on February 2, 1966. The Court then ordered a judgment of acquittal as to Count One (C.T. 7-9).

On February 11, 1966, appellant was sentenced to the custody of the Attorney General for five years upon each of the remaining counts, the sentences upon Counts Three and Four to run concurrently. Execution of sentence was suspended as to Counts Three and Four, with probation for five years, to commence upon completion of the sentence upon Count Two (C.T. 10). Appellant thereafter filed notice of appeal (C.T. 12).

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Insufficient evidence because Investigator Miller's

testimony should have been excluded because he gave the English translation of a conversation without remembering the original Spanish terminology employed in the conversation.

2. Insufficient evidence because Investigator Miller's testimony should have been excluded because he did not properly refresh his recollection from a document.

3. Insufficient evidence because Investigator Miller's testimony should have been stricken because his original rough notes were destroyed.

4. Alleged error in coercion of a co-defendant, allegedly depriving appellant of necessary testimony.

5. Alleged error in instructing the jury upon reasonable doubt.

6. Insufficient corroboration of appellant's admissions.

IV.

STATEMENT OF THE FACTS.

On September 13, 1965, Jose De La Rosa entered the United States from Mexico at Calexico, California. He was driving an automobile and was accompanied by his wife (R.T. 98, 103, 139).[2]

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[2] "R.T." refers to the Reporter's Transcript. There is some duplication in the numbering of the pages. Pages 1-21 appear at the commencement of the transcript and again at the end. In this brief, reference to pages 1-21 will refer to the earlier portion of the transcript.

At that time De La Rosa had approximately two ounces of heroin in his possession. An officer found the heroin in his pocket (R.T. 99, 139-40). The heroin had an estimated value of $250 an ounce on the Mexican side of the border (R.T. 178).

In De La Rosa's pocket there was a telephone number with the word, "Important," in Spanish, and the name, "Mr. Lugo." De La Rosa failed to reveal this when asked to remove everything from his pockets, although he did remove other items (R.T 107). Customs officers decided to go to Los Angeles to attempt to make a delivery of the heroin (R.T. 173-74). De La Rosa, his wife, and the heroin were taken to the Customs Agency office in Los Angeles, where approximately four grains of heroin from the original seizure were placed in a "dummy" package containing milk sugar mixed with other ingredients in order to create a color similar to that of heroin (R.T. 108-09, 182-84, 216-17). The heroin was not visible from the outside (R.T. 216).

Two or three telephone calls were made to the telephone number that was found in De La Rosa's possession. Appellant lived in the house which had that particular telephone number (R.T. 173-74). When one of these calls was made, a female answered on the other end and De La Rosa asked for appellant. The female stated that appellant was in the bathroom and could not come to the telephone at that time. De La Rosa said, "Well, tell him to come over to the house. I have something to show him and he'll know what it is." Appellant arrived at De La Rosa's home about

15 minutes later (R.T. 174-75, 177).

Before appellant arrived, the "dummy" package containing the heroin and other substances was placed in a sewing machine by De La Rosa (R.T. 110-111). Customs Agent James Jackson and Customs Port Investigator Owen Miller hid in a closet of De La Rosa's residence, and other officers hid in the kitchen area (R.T. 104, 109-110, 143).

After appellant arrived in De La Rosa's apartment, he had a conversation with De La Rosa. Appellant asked him if he had got it De La Rosa said that he had. Appellant asked how the trip went. De La Rosa said that it had gone well. Appellant asked, "Did it go as you told me?" De La Rosa indicated that it had. Appellant subsequently asked, "Where is it?" He then asked, "Is that all of it?" De La Rosa said, "Like brothers," meaning "honest" or "truthfully." Appellant asked, "Is that all you could get?" De La Rosa replied that he had his part (R.T. 149-50, 152, 154).

De La Rosa asked, "Where is your kit?" Appellant stated tha he did not have it with him and indicated that he was going home to "fix up" (take some narcotics). The officers left the closet and arrested appellant (R.T. 111, 153).

The term, "kit," is a word sometimes used to describe the paraphernalia used by a narcotics addict for the injection of heroin (R.T. 200).

The conversation between De La Rosa and appellant had been

in Spanish. Part of the conversation was not overheard by Investigator Miller, who testified concerning the portions of the conversation overheard by him. Miller had spoken Spanish throughout his life. In fact, it was the first language that he had ever learned (R.T. 146, 158).

Miller stated that part of his testimony concerning the conversation was from his recollection as refreshed by an exhibit (R.T. 149). His memory was refreshed from a document that he had dictated on September 15 or the following day. Miller believed that his original notes were destroyed after the document had been dictated and typed. He did not remember whether the original notes were in Spanish (R.T. 154, 156-58).

De La Rosa had entered the United States at approximately 10 p.m. on September 13. The telephone calls to appellant were mad between 9 and 10 a.m. on the following morning (R.T. 98, 173-79).

After the officers left De La Rosa's closet and approached appellant, the "dummy" package containing heroin and other substances was found in appellant's pocket. Appellant was advised of his legal rights and stated that the contraband that was found in his pocket was not his and that De La Rosa had given it to him. He said that he just couldn't throw it away. Then he reduced his voice to a whisper and said to Customs Agent Harold Diaz, "I want to talk to you alone. I'm working for you." Diaz escorted appellant into another room, where appellant stated that he was

working for a Federal narcotics officer and had come over to get the "stuff" to help the officers arrest De La Rosa. He was unable to name or describe the officer and said that he did not know the name of the organization that he worked for. Finally he admitted that he had never met the officer for whom he claimed to be working, but added that he had an appointment to meet the officer at 10 o'clock (R.T. 111-113, 181-82, 188).

Agent Diaz checked with the Federal Bureau of Narcotics office in Los Angeles and the Customs office in San Diego. Appellan was not working for those agencies and also was not working for the Customs office in Los Angeles (R.T. 189).

Appellant called no witnesses at the trial (R.T. 217).

The record upon appeal also includes some testimony that was not heard by the jury. A report stated that De La Rosa had told the officers that he had been approached by appellant to purchase heroin on a trip to Mexicali, that appellant gave him $200 with which to purchase narcotics and told him where to make contact, that he bought two ounces of heroin (half for Lugo) for $400. (R.T. 11-12).

On November 17, 1965, De La Rosa pleaded guilty to one count of an indictment and stated that the agents had forced him to deliver a white substance to appellant. He also stated that he did not remember everything because he was "drugged at the time. . ." In regard to the conversation with appellant in the apartment, De La Rosa stated:

"That is very possible that he asked me, 'How did the trip go? Did you score?' because he knew that my car was not in good condition and it needed oil." (R.T. 9, 13-14).

De La Rosa was sentenced to the custody of the Attorney General for 15 years with a suggestion that he testify in the case and tell the truth, which the Court would take into account. He was told that the sentence could be modified during a 60-day period (R.T. 18).

Appellant's counsel stated that on the day of De La Rosa's sentence, De La Rosa testified at the trial of appellant and implicated appellant as having been a conspirator in the smuggling offense, and that appellant was convicted and his motion for new trial was granted (R.T. 70-72). He also stated that De La Rosa's 15-year sentence was vacated, his plea of guilty was withdrawn, and he was allowed to reinstate a not guilty plea (R.T. 78).

De La Rosa's attorney stated that at the time that the motion for new trial was granted, "it was my understanding by stipulation of counsel that Mr. De La Rosa's testimony would no longer be needed, either for the United States or for the defense." (R.T. 86).

During appellant's second trial, De La Rosa was called as a witness outside of the presence of the jury. He testified to the effect that appellant was completely innocent. The Court

concluded that "I think this witness is just totally unreliable." (R.T. 95).

V.

ARGUMENT

A. TESTIMONY CONCERNING A CONVERSATION WAS ADMISSIBLE ALTHOUGH THE WITNESS COULD NOT REMEMBER THE ORIGINAL SPANISH TERMINOLOGY INVOLVED IN THE CONVERSATION.

Appellant contends that the evidence would be insufficient without Investigator Miller's testimony regarding the conversation in the apartment, and that Miller's testimony should have been stricken because he did not recall the original Spanish terminology employed in the conversation.

However, Miller testified from his existing memory as refreshed by a document (R.T. 149). It has been held that anything may be used to refresh the memory of a witness.

United States v. Rappy, 157 F. 2d 964 (2nd Cir. 1946);

Portman v. American Home Products Corp., 201 F. 2d 847, 850 (2nd Cir. 1953).

"Anything may in fact revive a memory: a song, a scent, a photograph, and allusion, even a past statement known to be false."

Rappy, supra, at p. 967.

Appellant asserts that he could not test the accuracy of Miller's translation, because Miller did not remember the original

Spanish terms employed in the conversation. However, it is not essential that a witness to a conversation remember the exact words employed. It is sufficient if a summary or substance of the conversation is remembered by the witness. This is evident from the decisions in Asaro v. Parisi, 297 F. 2d 859, 863 (1st Cir. 1962); and Rees v. Bank Building and Equipment Corporation, 332 F. 2d 548, 552 (7th Cir. 1964).

Since a witness may testify concerning the substance of a conversation in English, it is evident that he may do the same regarding a conversation in Spanish, particularly where he is so familiar with the language that he does his thinking in Spanish (R.T. 154) and where the record contains no conflict concerning the accuracy of his testimony.

Neither reason nor precedent supports appellant's position. In an age when international business transactions in various languages are commonplace, and where witnesses must of necessity rely upon business records, the search for truth in the courtroom would suffer a severe blow if the appellate courts adopted a rule prohibiting evidence of conversations where the witness could not remember the exact words employed in a foreign language. To expect any witness to recall verbatim a conversation of reasonable length, occurring several months or several years previously, is to expect too much.

Appellant relies upon a 1911 Hawaii case, an 1859 Illinois

case, and a 1939 Connecticut decision which bear little resemblance to the facts of the instant appeal. In Hawaii v. Kuwano, 20 Hawaii 469 (1911), the defendant, charged with perjury, contended that the witness was improperly translating, from Japanese to English, the previous testimony that was the essence of the perjury prosecution. It was held that the trial court committed error in refusing to permit the defense to cross-examine the witness concerning the exact Japanese words employed in the previous testimony. There was a vital distinction between Kuwano, in which the witness may have remembered the Japanese statements verbatim, and the instant case, in which the appellant claims that the witness did not remember the Spanish statements verbatim. Furthermore, during the trial of the instant case, appellant did not establish that Miller could not testify concerning the exact Spanish words employed in the conversation. His counsel asked Miller to place his recollection of the Spanish words in writing (R.T. 165). Miller apparently misunderstood the request and merely translated a written summary of the conversation from English to Spanish. Appellant did not pursue the matter in order to determine whether Miller remembered the Spanish terms employed in the conversation (R.T. 203-04). In Kuwano, such an attempt was made and was frustrated by the ruling of the trial judge.

In Schnier v. People, 23 Ill. 1 (1859), the witness remembered the key German word that was in issue and the defense

was not allowed to demonstrate that the word had more than one meaning. The opinion states that it is always "desirable" that the witness detail the same language used in the conversation "as far as possible . . . ." (at p. 23). The same statement appears in Schnier, supra. In the instant case, the possibilities of the witness's ability to remember the Spanish words were not exhausted. Furthermore, in both Kuwano and Schnier the translations were in dispute; in the instant case, it was not.

Appellant also relies upon State v. Perelli, 5 A. 2d 705 (1939), in which a written interpretation of statements made in the Italian language was not admissible because it contained assumptions or versions rather than "mere interpretation" (at p. 708). In the instant case, the situation is exactly the reverse. The testimony presumably contained mere interpretation rather than assumptions or editorializing.

It should be noted that testimony concerning part of a conversation is admissible although the witness did not hear all of the conversation.

Olmstead v. United States, 19 F. 2d 842, 846 (9th Cir. 1927), affirmed, 277 U.S. 438 (1928);

United States v. Schanerman, 150 F. 2d 941, 944 (3rd Cir. 1945).

Since appellant's attack upon the sufficiency of the evidence is limited to the question of the admissibility and

weight of Miller's testimony (Appellant's Opening Brief, p. 19), there will be no review of the entire evidence at this point. Of course, the claim of insufficient evidence would not apply to Count Four of the indictment, even if Miller's testimony was to be rejected, because conviction upon Count Four, alleging concealment, etc., of four grains of heroin in Los Angeles County, could be based upon the evidence of appellant's possession of that heroin (R.T. 111-12, 216-17), with the application of the statutory presumption under Title 21, United States Code, Section 174. Proof of possession alone is sufficient to support a conviction under 21 U.S.C.A. 174.

Harris v. United States, 359 U.S. 19, 22, 23 (1959);

Stoppelli v. United States, 183 F. 2d 391, 394 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950);

Chavez v. United States, 343 F. 2d 85, 87 (9th Cir. 1965).

Consequently, appellant's argument does not apply to the sufficiency of the evidence under Count Four.

B. INVESTIGATOR MILLER PROPERLY REFRESHED HIS MEMORY FROM A DOCUMENT.

Appellant asserts that the evidence would be insufficient without Investigator Miller's testimony and that the latter should have been stricken because he improperly refreshed his memory from an English translation of the conversation in the apartment. Appellant states that Miller's memory was not actually refreshed,

have been stricken because he had destroyed the original notes relating to his testimony.

However, a witness does not become incompetent to testify merely because some original notes relating to his testimony have been destroyed.

Killian v. United States, 368 U.S. 231, 242 (1961);
United States v. Baker, 358 F. 2d 18, 20 (7th Cir. 1966);
United States v. Hilbrich, 341 F. 2d 555, 557 (7th Cir. 1965), cert. denied, 381 U.S. 941 (1965).

While the above-cited decisions do not suggest that notes cannot be properly destroyed unless the exact contents are transferred to another paper, it should be noted that the trial Judge apparently concluded that the notes were consistent with the document that was shown to the defense:

> "The evidence indicates that he dictated from his notes within two days after the incident and the dictated notes he said were compared--rather, he didn't destroy his original notes until he had received a rough copy of what he dictated from the stenographer." (R.T. 165).

Appellant relies upon Ogden v. United States, 323 F. 2d 818 (9th Cir. 1963), and United States v. Lonardo, 350 F. 2d 523 (6th Cir. 1965). In Ogden the Court specifically declined to rule upon the issue (at pp. 820-21), although it cited a number of authorities (footnote 4 at p. 821) supporting appellee's

position herein and none to the contrary. In Lonardo, the Court of Appeals specifically limited its opinion to cases in which the prior statement was deliberately destroyed "on the eve of the trial." (at p. 529). Consequently, appellant derives little support from the limited holding in Lonardo.

Appellant emphasizes the fact that the destroyed notes may have been in Spanish and that the preserved statement was in English, causing a loss of the original Spanish. An analogous argument was unsuccessful in the United States Supreme Court:

> "As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of Ondrejka's oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by Ondrejka, and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right."

Killian, supra, at p. 242.

In Spindler v. United States, 336 F. 2d 678, 681 (9th Cir. 1964), cert. denied, 380 U.S. 909 (1965), where there was a contention that an officer had destroyed notes, this Court noted that there was no positive showing that the notes had ever been in existence. In the instant case, we do not have a positive showing to support appellant's basic claim, i.e., that the original notes were in Spanish. The officer testified that he could not remember whether the original notes were in Spanish or English (R.T. 154).

Appellant's basic argument involves sufficiency of the evidence. Here again, the argument would not apply to Count Four of the indictment, due to the presumption under 21 U.S.C.A. 174.

D. A FAIR TRIAL OF APPELLANT WAS NOT PRECLUDED BY THE ALLEGED COERCION OF A CO-DEFENDANT.

Appellant states that co-defendant De La Rosa was coerced into testifying against appellant in his first trial, that as a result, appellant's motion for new trial was granted, and De La Rosa could not be called as a witness for appellant at the second trial because he could be impeached by the testimony at the first trial, which allegedly was the product of coercion.

In effect, appellant is arguing that he is forever immune from prosecution because another person was coerced at one time in the past.

Appellant does not contend, of course, that the alleged coercion carried over into his second trial, preventing the possibility of favorable testimony by De La Rosa. De La Rosa was prepared to testify that appellant was completely innocent at the time of the second trial (R.T. 95). Appellant elected not to call him as a witness. (There was mention of a previous stipulation that neither side would call De La Rosa as a witness at the second trial, R.T. 86).

The short answer to appellant's impeachment argument is the fact that he could have called De La Rosa as a witness and then could have objected to the impeaching material in the event that it was offered by the prosecution. If his position was sound, the impeaching material would be inadmissible. If his position was erroneous, he would have nothing of which to complain.

In the event that De La Rosa's testimony from the first trial was ruled inadmissible, it is extremely doubtful that appellant would have called him as a witness. De La Rosa could have been impeached by evidence of statements made long before the alleged coercion occurred. Furthermore, his explanations upon behalf of appellant were highly entertaining but hardly calculated to convince the most naive listener. For example, he stated that appellant possibly asked him, "Did you score?" because "he knew that my car was not in good condition and it needed oil." (R.T. 14).

The second major difficulty in appellant's position is

his failure to present the issue to the trial Court during the trial. Appellant argued at trial that De La Rosa was still subject to the earlier coercion (R.T. 79-80). This argument collapsed when De La Rosa proved that he would ignore the "coercion" and claimed that appellant was innocent (R.T. 95). Appellant raised his new impeachment argument on February 11, 1966, nine days after the conviction (R.T. 287, 290-91). An issue must be raised in a timely fashion in the trial Court.

Ramirez v. United States, 294 F. 2d 277, 283 (9th Cir. 1961);

Stein v. United States, 166 F. 2d 851, 855 (9th Cir. 1948), cert. denied, 334 U.S. 844 (1948).

E. THE TRIAL COURT DID NOT COMMIT ERROR IN THE INSTRUCTIONS.

Appellant argues that the trial Court gave an erroneous instruction to the jury in regard to reasonable doubt and failed to give an instruction requested by appellant.

Appellant objects to the following discussion of "reasonable doubt" in the instruction that was given: "It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." (R.T. 260).

Appellant specifically objects to the "moral certainty"

and "abiding conviction" portion of the instruction. The United States Supreme Court has approved a "reasonable doubt" instruction that included the following language:

> "Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists."
>
> Miles v. United States, 103 U.S. 304, 309, 312 (1881) (Emphasis added).

The instruction given by the trial Court is a standard California instruction that has had statutory sanction since 1927.

California Penal Code Sections 1096, 1096a.

It is probably more favorable to the defendant than the law requires, because it requires the jurors to be morally "certain" of guilt. "Certainty" is something not normally found in human affairs. However, appellant may not object that the instruction was more favorable to him than he deserved it to be.

Appellant cites McGill v. United States, 348 F. 2d 791 (C.A.D.C. 1965), and United States v. Byrd, 352 F. 2d 570 (2nd Cir. 1965). In McGill the majority opinion suggested that certain language must be added to the "abiding conviction" phrase upon request by counsel (at pp. 797-98). This specific language was not requested in the instant case, so the holding in McGill does not apply.

In Byrd, supra, the "moral certainty" phrase was criticized, but it can hardly be contended that this 2-1 decision has the effect of silently overruling the United States Supreme Court opinion in Miles, supra.

Furthermore, appellant failed to comply with Rule 30 of the Federal Rules of Criminal Procedure, which provides that a party may not assign as error any portion of the charge or omission therefrom unless he objects, "stating distinctly" the matter to which he objects. Appellant objected to the "reasonable doubt" instruction but did not mention the "abiding conviction" and "moral certainty" provisions presently subject to question. His argument in the trial Court was primarily devoted to support for his proposed alternative instruction rather than an attack upon the standard California instruction that was given (R.T. 218-20, 283-84). Having failed to inform the trial Court of the alleged defect, he cannot raise the question at this time.

McGill v. United States, supra, at 797.

Appellant also complains of the trial Court's refusal to give the instruction requested by appellant, which provided that the jurors could not find appellant guilty unless they were "almost certain" of his guilt (C.T. 11). In absence of any legal authority to support such an instruction, it is respectfully submitted that the time-honored instructions upon reasonable doubt were adequate in this case.

F. THERE WAS NO VIOLATION OF THE CORPUS DELICTI RULE.

Appellant contends that there was insufficient corroboration of his admissions to support the conviction This argument would not apply to Count Four of the indictment, because possession alone is sufficient to sustain the conviction under that count.

The evidence under the other counts should be viewed in the light of the general rule to the effect that the corpus delicti may be established by substantial independent evidence tending to establish the trustworthiness of the admissions.

Opper v. United States, 348 U.S. 84, 93 (1954).

It is respectfully submitted that the Opper test was satisfied in the instant case.

Furthermore, the corpus delicti rule does not always apply to admissions made as part of the commission of the crime itself.

People v. Fratianno, 132 Cal. App. 2d 610, 628 (1955).

The most important "admissions" in the instant case were made while the crimes were being committed, i.e., during the discussions between appellant and De La Rosa in the apartment. The corpus delicti rule was intended to lessen the possibility of convicting an innocent man who confesses as a result of some mental quirk.

Burdick, The Law of Crime, Vol. 2, p. 108.

It was not intended to apply to a suspect's conspiratorial discussions overheard by witnesses, whether the witnesses are co-conspirators or law enforcement officers.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney,

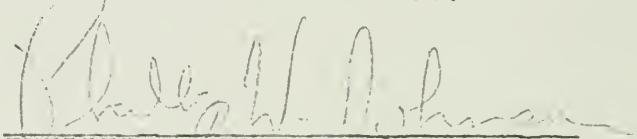
MOBLEY M. MILAM,
Chief Assistant U.S. Attorney,

PHILLIP W. JOHNSON,
Assistant U.S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[illegible], Appellant, -vs- UNITED STATES OF AMERICA, Appellee.	No. [illegible] ✓ **AFFIDAVIT OF SERVICE BY MAIL**

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF CALIF. } ss.

[illegible], being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is 325 West "F" Street, San Diego, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on November 1, 1966 she deposited in the United States Mails, San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, [illegible] copies of [illegible]

addressed to [illegible], [illegible] California [illegible], [illegible] last known address, at which place there is a delivery service by United States Mails from said post office.

SUBSCRIBED and SWORN to before me, ______________________

this [illegible] day of [illegible], 19 66.

WILLIAM W. LUDDY, Clerk, U.S. District Court
Southern District of California